



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 1207 OF 2018

REUBEN MASIKA MANYURU.....CLAIMANT

VERSUS

CHUNA CO-OPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 1206 OF 2018

SILAS KIPKIRUI ROTICH.....CLAIMANT

VERSUS

CHUNA CO-OPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....RESPONDENT

RULING

Before me, for determination are two motions filed both dated 16th July, 2018. They seek the following orders:

1. Spent.
2. That pending the hearing and determination of the Applications the Court be pleased to grant a temporary injunction to restrain the Respondent by itself, or through its servants and/or agents from terminating the employment of the Applicant and that the Applicant be reinstated forthwith in his position as a Registry Clerk with the Respondent.
3. That pending the hearing and determination of the suit this Court be pleased to grant a temporary injunction to restrain the Respondent by itself, or through its servants and/or agents from terminating the employment of the Applicant and that the Applicant be reinstated forthwith in his position as a Registry Clerk with the Respondent.
4. That the costs of this Application be awarded to the Applicant.

This Application is premised on the grounds that:-

- a) The Applicant was employed as a Registry Clerk by the Respondent on or about 22nd December, 2016
- b) The Applicant duly discharged his duties as aforesaid diligently and with dedication to the satisfaction of the Respondent.
- c) On diverse dates between March and June 2018 the Respondent lost money in the sum of Kshs.4.4 Million in a fraudulent scheme

perpetrated by two of its members

d) One of such members, Daniel Onyango Owuor, was on 13th June, 2018 arraigned before the Chief Magistrates Court in Nairobi and charged with the theft of Kshs.4.4 Million while the other, one David Ochieng, went underground and is being treated as a suspect.

e) At the time the alleged offence took place the Applicant was on sick leave for the period 20th February, 2018 to 4th April, 2018 following a surgical operation that he had undergone and immediately thereafter was granted two weeks compassionate leave from 23rd April, 2018 to 8th May, 2018 following the demise of his brother.

f) The Applicant as the Registry Clerk was interrogated by, and recorded a statement with the police as a Prosecution Witness.

g) In complete violation of the Applicant's rights, the Respondent in a board meeting held on 19th June, 2018 purported to pass a resolution to suspend the Applicant from his employment without pay without according him an opportunity to defend himself, which decision was communicated to the Applicant on 22nd June, 2018.

h) The Applicant and his union protested the said suspension but the Respondent has persisted in its unlawful cause.

i) The employment file that the Applicant was required to produce to the Respondent was last seen in October, 2017 and the cabinets where the said or such files are stored is open and not closed and hence accessible to any person.

j) The said suspension is unfair and unlawful as the Applicant was condemned unheard contrary to the Labour Laws and practices and in breach of the rules of natural justice.

k) The Applicant stands to suffer immense and substantial loss and damage if the Respondent is not restrained from its unlawful acts as he is the sole bread winner of his family and his only source of income and livelihood is his salary.

The Applications with respect to both applicants are supported by the Affidavits sworn by **REUBEN MASIKA MANYURU and SILAS KIPKIRUI ROTICH** the applicants on 16th July 2018. They reiterate the grounds on the face of the motion. The Applications are filed under Rule 16 and 27 (sic) of the Industrial Court (Procedure) Rules and all enabling provisions of the law.

The Respondent opposed the Application vide a Replying Affidavit sworn by GEORGE OTIENO OCHIENG on 24th September, 2018 and filed in Court on 25th September, 2018 in which he avers that the instant Application is fatally defective and that the same ought to be struck out.

He further avers that the Claimants were suspended from the Respondent's employment on 22nd June, 2018 to pave way for investigations into the loss of Kshs.4,400,000 by the Respondent which was as a result of its computer IT system being accessed by unauthorised persons.

The Respondent contends that the suspension of the Claimant's is a disciplinary procedure which falls within the exclusive purview of the Respondent's prerogative. The Respondent further contends that after its investigation it found that the Claimant's possibly aided in the perpetration of the offence which necessitated its decision to suspend them from employment in accordance with its terms and conditions of service for unionisable staff that allows for suspension with no pay.

The Respondent avers that the instant Application is therefore premature and unmeritorious and ought to be dismissed with costs. It contends that the Claimants failed to discharge their duties in good faith and should not obtain any advantage in the proceedings.

The Claimants filed Supplementary Affidavits sworn on 12th October, 2018 by both Claimants in response to the Replying Affidavit filed by the Respondent. In the supplementary affidavits, they acknowledge the Respondent's prerogative to conduct disciplinary proceedings. They however contend that the prerogative ought to be exercised reasonably and lawfully.

The Claimants further contend that investigations conducted both internally and by the Kenya Police found that the loss was occasioned by Daniel Onyango Owuor, who was arrested and criminal charges preferred against him, and David Odhiambo who has since absconded duty. That both Claimants were treated as prosecution witnesses.

The Claimants contend that their suspension by the Respondent was uncalled for, malicious and was in bad faith as they were not responsible for the loss occasioned to the Respondent as revealed by the investigations.

They further contend that despite the fact that they were invited for a disciplinary hearing on 18th September, 2018, the same was not fair as the Respondent's representatives were unhappy that the Claimants had filed the Claims now pending before this Court and insisted that the claimants wait for the outcome of the pending cases before this Court.

The Claimants urged the Court to allow their applications as it is not true that investigations are still on-going, the same having been concluded. Further that the Disciplinary Proceedings did not take place as required by the Terms and Conditions of Service.

Submissions by the Parties

It is submitted on behalf of the Claimants'/Applicants' that the instant Application ought to be allowed as prayed as the Respondent failed to follow the set down procedure as provided in Sections 10, 12 and 16 of the Employment Act with regards to conducting disciplinary proceedings as well as the terms and conditions of service, and in particular condition 5.

The Claimants' further submitted that the Respondent was engaged in a witch-hunt hence the decision to file their proceedings herein. It is further submitted that the Claimants have a legal and constitutional right under Section 87(1) of the Employment Act, 2007.

The Claimants further contended that despite the fact that the Respondent has power to institute and carry out disciplinary proceedings against the Claimants, the Respondent chose to harass the Claimants' since they had filed the instant claims in complete contravention to the provisions of Section 5(3)(b) of the Employment Act, 2007.

The Claimants' contend that the Respondent lacked the basis for carrying out its own investigations against the Claimants' herein and that it is abusing this right by carrying out the investigations oppressively against the Claimant. The Claimants' relied on the Court's findings in the case of *Fina Bank Limited -V- Sparaes and Industries Limited (2000) 1 EA 52* at page 58 where the Court of Appeal held that where a party has a statutory right of action, the Court will not usually prevent the right from being exercised but the Court will interfere if there is no basis on which the right could be exercised or it was being exercised oppressively.

The Claimants' admit that mandatory injunctions ought not to be granted on an interlocutory application except in special circumstances. They contend that their case is special and therefore urge the Court to allow their application. For emphasis the Claimants' cited the cases of *Kenya Breweries Limited VsOkeyo (2002) 1 EA 109* and *Nairobi Civil Application Number 186 of 1992, Kamau Mucuha -V- Ripples Limited.*

In conclusion the Claimants' contend that they have made out a very strong case why the Respondent should re-instate them back to their employment with full benefits as prayed in the instant Application as well as being granted costs for the Application.

Respondent's Submissions

It is submitted by the Respondent that the instant Application is unmeritorious and that the same ought to be dismissed with costs to the Respondent.

The Respondent further submits that the Claimants' were suspended in accordance with the provisions of its terms and conditions of service for non-unionisable staff. The Respondent further submitted that the lapse of 4 months since the said suspension does not automatically mean the Claimants should be reinstated.

The Respondent further contended that the Claimants would be entitled to their salaries and benefits should they be found not at fault at the end of the investigations.

In conclusion the Respondent submitted that the Court proceeds

to find that the Claimants/Applicants have failed to prove their case for granting of the Orders sought therein.

Analysis and Determination

Having considered the Application the Affidavits and submissions filed by the parties, it is my considered opinion that the issue for determination is whether or not the Application dated 16th July, 2018 are merited.

What is the threshold for granting temporary injunctions

The criteria for granting temporary injunction Orders was set out in the case of *Giella v Cassman Brown [SUPRA]* as:

"... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."

Prima Facie Case

In the letters of suspension, Rueben Masika Manyuru is accused of the following –

"In the process of investigations you have been requested as the custodian of the Society's Registry to produce the file belonging to member No. 13211 to aide with the investigations but to which you have subsequently failed to produce."

Silas Kipkirui Rotich is also accused of the following –

"As the System Administrator you granted system user rights which he should not have had and he subsequently abused the same rights."

Both letters of suspension are dated 22nd June 2018. The claims by the applicants were filed on 16th July 2018, together with the applications.

According to the memorandum of agreement between the respondent and the Kenya Union of Commercial Food and Allied Workers (The Union) which covers the applicants, Clause 6 provides for interdiction and suspension as follows –

6. *INTERDICTION AND SUSPENSION*

(a) An employee may be interdicted from duty pending the employer's investigation into the circumstances surrounding such interdiction. The employee shall be on half-pay and full house allowance during the interdiction.

(b) An employee may be suspended from duty pending investigation.

(i) An employee on suspension shall not receive any pay at all.

(ii) Not more than 4 months will be taken in investigating the matter.

(c) If after investigation the employee is found innocent, the withheld salary/benefits shall be paid in full immediately upon reinstatement. If proved guilty to an extent warranting dismissal, the date of suspension/interdiction shall be the effective date of termination.

From the letters of suspension, there is valid reason for investigation of the applicants. Both applicants do not deny that there was fraud by which the respondent lost shs.4.4 million. Both of them responded to the letters of suspension directly and also through the union.

Under Clause 6 of the memorandum of agreement reproduced above, investigations are expected to take not more than four months. The applicants came to court even before one month had lapsed from the date of their suspension.

From the foregoing, I find the applications premature and unmeritorious. The applicants did not cite any valid reason why the disciplinary process against them should not be allowed to be concluded in the manner and within the period stipulated in the memorandum of agreement governing their terms of service.

As was stated in the case of *Nixon Bugo -V- The Alliance for a Green Revolution Africa*, the court will only intervene in internal disciplinary processes if the employer derogates materially from the internal disciplinary process and the law. That is not the case in the instant applications.

It is further not denied that should the respondent be at fault, the applicants can be adequately compensated by way of damages, in addition to the right to be reinstated as provided in both Section 49(3) of the Employment Act and Section 12(3) of the Employment and Labour Relations Court Act.

For the foregoing reasons I find that the applicants have not demonstrated a prima facie case to warrant the grant of the orders sought with the results that their applications fail.

I accordingly dismiss the applications with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE